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Insights

AFFIRMATIVE ACTION: EFFECTS OF THE RULING AND ACTIONS TO TAKE NOW

Jun 30, 2023

In a long-awaited decision, the Supreme Court ruled yesterday, June 29, that race-based admissions practices at public and private universities and colleges violate the Equal Protection Clause of the Fourteenth Amendment. This decision will have significant impacts in higher education and, potentially, cascading impacts for employers and others implementing diversity initiatives nationwide.

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina*, the Supreme Court addressed challenges to the admissions systems used by those universities based on their consideration of race. Prior cases addressing affirmative action had permitted race-based admissions policies only if race was not used as a stereotype or negative in decision-making and, importantly, if the affirmative action program had an endpoint. Under those prior decisions, affirmative action programs had to be operated in a manner that was "sufficiently measurable" to permit judicial review under the strict scrutiny standard.

Here, despite the obvious similarities of the diversity objectives of the Harvard and UNC admissions policies and objectives to those at issue in prior cases, the Court rejected the notion that the institutions' diversity objectives reflected compelling interests that could be subject to meaningful review. In particular, the Court found that the aims of the universities' diversity-focused affirmative action programs — "training future leaders," preparing graduates to live in a pluralistic society, improving education through diversity, and promoting the robust exchange of ideas, among other argued goals — were commendable but "not sufficiently coherent for purposes of strict scrutiny." Op. at 23. Not only did the Court find such goals impossible to measure (*e.g.*, "How is a court to know whether leaders have been adequately 'train[ed]'"? Op. at 23), it also found that it was impossible for a court "to know when they have been reached, and when the perilous remedy of racial preferences may cease." *Id.* The Court therefore overturned decades of precedent permitting limited affirmative action programs and held that policies that consider race in admissions decisions were inconsistent with the Equal Protection Clause.

For institutions of higher education, this means admissions decision-makers may no longer consider race even when race is only one factor among many. The Supreme Court did leave open the door to the consideration of an individual applicant's expression of how racial discrimination has impacted him or her, suggesting applicant essays may be elicited to address this lived experience related to race. But other efforts to build diverse student bodies through proxies for race will be subject to significant scrutiny and pose potential litigation risk as plaintiffs' groups like Students for Fair Admissions continue to try to eliminate any direct or indirect consideration of race in admissions decisions. Only race-neutral approaches whose underlying intent is not to promote racial diversity within the student body will be safe from attack.

Though yesterday's decision focused exclusively on university admissions programs, the language of the opinion has ominous implications for diversity, equity and inclusion (DEI) programs more broadly. The Supreme Court's broad indictment of "amorphous" diversity initiatives, rather, should inspire employers to take steps now to insulate their DEI initiatives from potential challenges. In the employment context prior to the Court's recent ruling, unlike in higher education, Title VII already prohibited employers from considering race when making employment decisions such as hiring, promotion or termination and the Court's recent decision may not directly impact employers' ability to cast wide nets to identify qualified diverse candidates. A statement issued by the Equal Employment Opportunity Commission in response to the Court's ruling states: "It remains lawful for employers to implement diversity, equity, inclusion and accessibility programs to ensure workers of all backgrounds are afforded equal opportunity in the workplace." The Court's decision made clear that the Court does not accept the benefits of diversity as sufficiently measurable to permit judicial review, and thus insufficient to pass strict scrutiny. Employers' programs to build diverse workforces, including diversity fellowships and hiring initiatives, may therefore end up subject to greater challenge.

Already we have seen several states with initiatives to bar certain DEI programs, which employers already should be working to defend. Empowered by yesterday's affirmative action decision, we can anticipate more state legislatures enacting laws to inhibit DEI-focused employment initiatives and significant litigation challenging such practices. Because the Supreme Court has now rejected unequivocally the notion that "there is an inherent benefit in race *qua* race—in race for race's sake", Op. 29, and because employment decisions are, like university admissions decisions, to some extent a "zero sum" game, we see real risks for employers implementing DEI initiatives, particularly in their hiring practices. Though it may not ensure the successful defense of a DEI initiative, employers can at least prepare to defend their programs by attempting to articulate clearly measurable diversity objectives and how their adopted initiatives achieve those objectives.

While institutions of higher education and K-12 institutions that have race-conscious admissions programs will have to promptly change their approaches to student admissions decisions, employers committed to DEI in their workplaces can be preparing to defend their policies by:

- Avoiding any programs or policies that could be interpreted as establishing race or gender based quotas;
- Considering race-neutral alternatives to racially-conscious fellowship, internship, and hiring programs that could help achieve their DEI goals; and,
- Clearly articulating the Company's DEI goals and collecting data and evidence of the business benefits attributable to the DEI goals adopted.

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MEET THE TEAM

Sarah Hartley

Washington / Boulder

sarah.hartley@bclplaw.com
+1 303 866 0363

Lisa Braxton

Atlanta

lisa.braxton@bclplaw.com
+1 404 572 6616

Marilyn M. Fish

Atlanta

marilyn.fish@bclplaw.com
+1 404 572 6632

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